Shencourt Sdn Bhd v Arab-Malaysian Toda Construction Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–137 OF 1998
STEVE SHIM J
22 MAY 1998

Arbitration *— Arbitrator — Reference of question of law to court — Whether arbitrator should be directed by court to refer the question — Principles applicable — Question of procedure — Whether a specific or formal request was made to the arbitrator — Whether request was bona fide — Arbitration Act 1952 s 22*

The plaintiff and the first defendant entered into a written contract which incorporated the PAM agreement and schedule of conditions, in which the first defendant agreed to build for the plaintiff a shopping/commercial complex. The first defendant later alleged that the plaintiff had failed to make payment under interim certificates Nos 13, 14 and 15 and terminated the contract on 6 May 1996. The dispute was referred to arbitration and the second defendant was appointed as the arbitrator. On 29 October 1997, the first defendant applied to the second defendant for an interim award for the sum due under certificates Nos 13, 14 and 15. During the course of hearing, arguments relating to the validity of certificate No 17, allegedly issued by the architect subsequent to certificates Nos 13, 14 and 15, were raised. Corollary to the validity issue, the question of whether the architect was functus officio on the termination of the contract by the first defendant was also argued. The plaintiff's counsel wrote a letter dated 30 March 1998 to the second defendant seeking an indication as to whether the second defendant would be handing down the interim award before the main arbitration proceedings and have the issue concerning the legal status of certificate No 17 stated for the decision of the High Court. The second defendant replied in the negative on both counts. As a result, the plaintiff applied vide an originating summons for an order directing the second defendant to have certain questions of law stated for the decision of the High Court.

Held, dismissing the application:

(1) If an arbitrator in an arbitration refuses to state a case for the court's decision when requested to do so, an application may be made to the High Court for an order directing him to do so. The court will not direct an arbitrator to state a special case unless: (i) the applicant has in the first instance requested him to state a case and the request has been refused; and (ii) the question of law on which the court's opinion is desired is material to the issues between the parties, and, having regard to all the circumstances of the case, the question is such as should be determined by the court. The court's power to direct an arbitrator to state a case is discretionary. Certain guidelines have been established in exercising such a discretion,

namely: (i) the question of law must be clear cut and capable of being accurately stated as a point of law; (ii) it must be a point of law which is open to serious argument; (iii) it must be substantial in the sense of being important for the resolution of the dispute; and (iv) it must be raised bona fide and not for some ulterior motive. However, there may be other circumstances in which the court will refuse to order a special case even when the above requisites are satisfied (see p 478C–F).

(2) The question of whether the second defendant should more appropriately have handed down the interim award prior to the main arbitration proceedings is clearly more a point of procedure than a point of substantive law or a point of law involving a question of principle. Thus, it is not suitable to be stated for the decision of the High Court (see p 478F–H).

(3) With regard to the validity or legal status of certificate No 17, there was no specific or formal request to the second defendant to state a case for the decision of the High Court. There was merely submission to that effect. It was only later, that the plaintiff's counsel sent the letter dated 30 March 1998. Besides, the submission came at the end of the hearing, which seems to suggest that it might have arise as an afterthought. There was also a total and conspicuous absence of any mention of the matter in the written submission of the plaintiff's counsel dated 12 January 1998. In the circumstances, it would not be unfair to say that the request of the plaintiff to the second defendant is not made bona fide. Furthermore, the legal status of certificate No 17 is not a point of law which is open to such serious argument as to justify stating it for the decision of the High Court (see pp 479E–F, 480C–E).

[Bahasa Malaysia summary

Plaintif dan defendan pertama telah memasuki satu kontrak bertulis yang mengandungi perjanjian PAM dan jadual syarat-syarat, di mana defendan pertama bersetuju untuk membina satu kompleks membeli-belah/perniagaan kepada plaintif. Defendan pertama, kemudiannya mendakwa bahawa plaintif telah gagal untuk membuat pembayaran di bawah sijil interim No 13, 14 dan 15 dan telah menamatkan kontrak tersebut pada 6 Mei 1996. Pertikaian tersebut telah dirujuk kepada timbangtara dan defendan kedua telah dilantik sebagai penimbangtara. Pada 20 Oktober 1997, defendan pertama memohon kepada defendan kedua untuk satu award interim untuk jumlah yang tertunggak di bawah sijil No 13, 14 dan 15. Semasa pembicaraan, hujahan berkenaan dengan keesahan sijil No 17, yang didakwa dikeluarkan oleh akitek selepas sijil No 13, 14 dan 15 telah ditimbulkan. Ekoran kepada isu keesahan tersebut, persoalan tentang sama ada akitek tersebut adalah functus officio bilamana kontrak ditamatkan oleh defendan pertama, juga telah dihujahkan. Peguamcara plaintif menulis sepucuk surat bertarikh 30 Mac 1998

kepada defendan kedua meminta petunjuk sama ada defendan kedua akan memberikan award interim tersebut sebelum prosiding timbangtara yang utama dan membolehkan isu berkenaan dengan status perundangan sijil No 17 dinyatakan untuk diputuskan oleh Mahkamah Tinggi. Defendan kedua telah menjawab secara negatif untuk kedua-dua kes. Sebagai akibat, plaintif memohon melalui satu saman pemula untuk, antara lainnya, satu perintah mengarahkan defendan kedua menyatakan persoalan undang-undang yang tertentu untuk diputuskan oleh Mahkamah Tinggi.

Diputuskan, menolak permohonan:

(1) Adalah jelas bahawa jika seorang penimbangtara di dalam satu timbangtara enggan menyatakan satu kes untuk diputuskan oleh mahkamah bila diminta untuk berbuat demikian, satu permohonan boleh dibuat kepada Mahkamah Tinggi untuk satu perintah mengarahkan beliau berbuat demikian. Mahkamah tidak akan mengarahkan seorang penimbangtara untuk menyatakan satu kes yang khas kecuali: (i) pemohon telah pada mulanya meminta beliau menyatakan satu kes dan permintaan tersebut telah ditolak; dan (ii) persoalan undang-undang yang mana pendapat mahkamah adalah diperlukan, materia kepada isu-isu di antara pihak-pihak, dan, dengan mempertimbangkan semua keadaan-keadaan kes tersebut, persoalan tersebut adalah sedemikian ia patut ditentukan oleh mahkamah. Kuasa mahkamah untuk mengarahkan seorang penimbangtara untuk menyatakan satu kes adalah atas budibicaranya. Garis panduan tertentu telah ditetapkan dalam melaksanakan budibicara sedemikian, iaitu: (i) persoalan undang-undang tersebut mestilah jelas dan boleh dinyatakan sebagai satu perkara undang-undang secara tepat; (ii) ia mesti satu perkara undang-undang yang terbuka kepada penghujahan yang serius; (iii) ia mesti cukup substantif dalam erti kata bahawa ia adalah penting untuk penyelesaian pertikaian tersebut; dan (iv) ia mesti ditimbulkan secara bona fide dan bukan untuk sesuatu motif yang tersembunyi. Bagaimanapun, mungkin terdapat keadaan-keadaan lain yang mana mahkamah akan enggan memerintahkan satu kes khas walaupun keperluan-kepeluan di atas adalah dipenuhi (lihat ms 478C–F).

(2) Persoalan sama ada defendan kedua patut dengan lebih sesuai memberikan award interim tersebut sebelum prosiding utama timbangtara adalah dengan jelas lebih kepada satu perkara prosedur daripada perkara undang-undang substantif atau satu perkara undang-undang yang melibatkan persoalan prinsip. Oleh itu, ia adalah tidak sesuai untuk dinyatakan untuk diputuskan oleh Mahkamah Tinggi (lihat ms 478F–H).

(3) Berkenaan dengan keesahan atau status perundangan sijil No 17, tidak terdapat satu permintaan yang spesifik atau formal kepada defendan kedua untuk menyatakan satu kes untuk diputuskan

oleh Mahkamah Tinggi. Hanya terdapat hujahan semata-mata berkenaannya. Hanya kemudiannya, peguamcara plaintif menghantar surat bertarikh 30 Mac 1998. Lagipun, hujahan tersebut hanya timbul di akhir pembicaraan, yang mana mencadangkan bahawa ia mungkin timbul sebagai sesuatu yang difikirkan kemudian. Terdapat juga, satu ketiadaan yang menyeluruh dan menonjol tentang pengataan perkara tersebut dalam hujahan bertulis peguamcara plaintif bertarikh 12 Januari 1998. Dalam keadaan yang tersebut, tidak akan menjadi tidak adil untuk menyatakan bahawa permintaan plaintif kepada defendan kedua adalah dibuat secara tidak bona fide. Selanjutnya, status perundangan sijil No 17 bukanlah satu perkara undang-undang yang terbuka kepada satu penghujahan yang sebegitu serius sehingga menjustifikasikannya dinyatakan untuk diputuskan oleh Mahkamah Tinggi (lihat ms 479E–F, 480C–E).

Notes

For a case on reference of question of law to court, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 914.

Cases referred to

Bornholm (Ewners) v Exporthleb, Moscow [1937] Lloyd's Law Rep 59 (refd)

General Rubber Co Ltd v Hessa Rubber Maatschappij (1927) 28 Lloyd's Law Rep 362 (refd)

JA Milestone & Sons Ltd (In liq) v Yates Castle Brewery Ltd [1938] 2 All ER 439 (refd)

Halfdan Greig & Co A/S v Sterling Coal & Navigation Corp and AC Neleman's Handel-en Transportondernerming, The Lysland [1973] 1 Lloyd's Rep 296; [1973] 1 QB 843 (refd)

Legislation referred to

Arbitration Act 1952 ss 13(6), 22(1), (2)

K Mohan (*Cheah, Yap & Partners*) for plaintiff.
Bill Davidson (*Azman, Davidson & Co*) for the first defendant.

Steve Shim J: By an originating summons dated 4 April 1998, the plaintiff has applied: (a) for an order directing the second defendant ('the arbitrator') to have certain questions of law stated for the decision of the High Court pursuant to s 22 of the Arbitration Act 1952; and (b) for an interim injunction against the second defendant pursuant to s 13(6) of the same Act. Specifically, the plaintiff prays as follows:

(1) For order for directions under s 22(1) and 22(2) Arbitration Act 1952 for a case to be stated in the form of a special case for the decision of the High Court on the following questions:

(i) that it is incumbent on an arbitrator having heard an application for an interim award under s 15 of the Arbitration Act 1952 on matters that impinge or are inextricably connected with the issues in the main arbitration to hand down the interim award before proceeding with the main arbitration;

(ii) that as a matter of proper procedural law and justice an arbitrator having heard an application for an interim award under s 15 of the Arbitration Act 1952 should first hand down the interim award before proceeding to the main arbitration especially if there are matters that impinge or are inextricably connected with the issues in the main arbitration;

(iii) that the legal status of certificate No 17 dated 3 November 1997 ought to be decided forthwith as it has a central bearing to the entire case of the plaintiff and the first defendant and commonly touching on the issues raised for the interim award and in the main arbitration proceeding;

(iv) that certificate No 17 is extant and good in law as issued by the project architect who does not become functus officio merely because the services of the first defendant as main contractor has ceased or terminated.

(2) An interim injunction to restrain the second defendant from proceeding with the adjudication in the main proceedings until further order.

(3) Costs.

At the outset, it is, I think, appropriate to state briefly the factual background leading to this application. Pursuant to a letter of award dated 5 October 1994 and a written contract dated 21 December 1994 incorporating the PAM Agreement and Schedule of Conditions, the first defendant had agreed to build for the plaintiff a shopping/commercial complex. However, differences between the parties emerged when the first defendant alleged that the plaintiff had failed to make payment under three interim certificates No 13, 14 and 15 duly issued by the architect. Thereafter, the first defendant gave notice to the plaintiff on 6 May 1996, terminating the contract. The dispute was then referred to arbitration and Mr Sundra Rajoo was appointed as the arbitrator. He is the second defendant named in this originating summons. With the agreement of the parties, the second defendant allotted 100 days for hearing the arbitration. Nevertheless, on 29 October 1997, the first defendant applied to the second defendant for an interim award in the sum of RM4,341,421.72 being the total amount purportedly due under certificates No 13, 14 and 15. This application was heard by the second defendant on 13 March 1998 and the decision is still pending. During the course of hearing before the second defendant, there were arguments relating to the validity of certificate No 17 allegedly issued by the architect subsequent to the three certificates in question. Corollary to the validity issue, the question of whether the architect was functus officio on the termination of the contract by the first defendant was also argued before the second defendant. Subsequently, the plaintiff's counsel wrote a letter dated 30 March 1998 to the second defendant seeking an indication as to whether the latter would be handing down the interim award before the main arbitration proceedings and also

specifically requesting him to have the issue concerning the legal status of certificate no 17 be stated for the decision of the High Court. The second defendant replied in the negative on both counts. As a result, the plaintiff has now filed this originating summons.

Now, ss 22(1) and (2) of the Arbitration Act 1952 provides, firstly, that an arbitrator may, and shall if so directed by the High Court, state either: (a) any question of law arising in the course of the reference; or (b) any award or any part of an award for the decision of the High Court and secondly, that a special case with respect to an interim award or with respect to a question of law arising in the course of a reference, may be stated or be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending. It is clear that if an arbitrator in an arbitration refuses to state a case for the court's decision when requested to do so, application may be made to the High Court for an order directing him to do so. The court will not direct an arbitrator to state a special case unless: (a) the applicant has, in the first instance, requested him to state a case and the request has been refused; and (b) the question of law on which the court's opinion is desired is material to the issues between the parties, and, having regard to all the circumstances of the case, is such as should be determined by the court. The court's power to direct is discretionary. Certain guidelines have been established in exercising such a discretion. They are as follows: (1) the question of law must be clear cut and capable of being accurately stated as a point of law; (2) it must be a point of law which is open to serious argument; (3) it must be substantial in the sense of being important for the resolution of the dispute; and (4) it must be raised bona fide and not for some ulterior motive (see *Halfdan Greig & Co A/S v Sterling Coal & Navigation Corp and AC Neleman's Handel-en Transportondernerming, The Lysland* [1973] 1 Lloyd's Rep 296; [1973] 1 QB 843 (CA)). However, there may be other circumstances in which the court will refuse to order a special case even when the above requisites are satisfied (see *Bornholm (Ewners) v Exporthleb, Moscow* [1937] Lloyd's Law Rep 59).

It is in the light of the above stated principles that the application in this originating summons will be considered. I have cited in full the four questions raised by the plaintiff. In my view, the first two questions posed can be considered together since they turn on the same point, namely, whether the arbitrator should more appropriately have handed down the interim award prior to the main arbitration proceedings. This is clearly more a point of procedure than a point of substantive law or a point of law involving a question of principle. It cannot be regarded as a point of law which is open to serious argument nor can it be considered a substantial point for the resolution of the dispute between the parties. In the circumstances, I hold that it is not suitable to be stated for the decision of the High Court.

The other two questions posed relate essentially to the legal status and effect of certificate No 17 issued by the architect. The point as to whether or not the architect was functus officio at the time he issued the said certificate No 17, is merely a corollary to the issue of the validity or legal status of that certificate. This view is similarly taken by the plaintiff as

reflected in para 10 of Lee Kam Yoong's first affidavit. They can, therefore, be conveniently dealt with jointly.

As I have said earlier, it is not disputed that on 29 October 1997, the first defendant applied to the second defendant for an interim award amounting to RM4,341,421.72 being the total sum purportedly due under certificates No 13, 14, and 15 issued by the architect. The application was resisted by the plaintiff on the grounds, inter alia, that the architect had subsequently issued a certificate No 17 which, if accepted and taken into account, would effectively nullify the first defendant's claim under the three certificates aforesaid, and establish that at the date of the purported termination of the contract by the first defendant, the plaintiff had in fact over-paid the first defendant the sum of RM442,766.01.

The first defendant has disputed the validity or legal status of certificate No 17, relying principally on the case of *JA Milestone & Sons Ltd (In liq) v Yates Castle Brewery Ltd* [1938] 2 All ER 439 which decided that an architect was functus officio and could not issue further certificates once disputes had arisen and been referred to arbitration. These contentions appear to have been fully canvassed by counsels for the parties concerned before the second defendant on 13 March 1998. However, the plaintiff through the first affidavit of Lee Kam Yoong, has alleged that at the close of the hearing of the interim award application, its leading counsel had submitted to the second defendant that it would be in accordance with proper procedures and justice if the interim award was handed down by him prior to the arbitration proceedings on the merits and/or for a case to be stated in relation to certificate No 17.

It would appear that there was no specific or formal request to the second defendant to state a case for the decision of the High Court at that point in time. There was merely a submission to that effect. It was only later, as I said, that the plaintiff's counsel, by a letter dated 30 March 1998, requested, to use the words in para 13 of Lee Kam Yoong's first affidavit, 'an indication from the second defendant whether an interim award will be handed down by the latter prior to the main arbitration proceedings and/or in any event, a case would be stated for the High Court's decision in respect of certificate No 17'. The second defendant replied to that request vide his letter dated 3 April 1998, indicating that he could hand down the interim award at any time before the final award and refusing the plaintiff's request to state a case to the High Court. The reasons for so doing can be found in para 3 of the said letter which reads:

> As to the matter of stating a case on the status and effect of certificate No 17, I am of the view that I can decide on it as the standard form PAM contract provides the arbitrator power to open up, review and revise the said certificate. *Also, I agree with the claimant's reasoning that the respondent is estopped from requiring that the legal status of certificate no 17 be stated for the decision of the High Court.* (Emphasis added.)

Mr Mohan, counsel for the plaintiff, submits that the second defendant has taken what he described as an alarming position in holding that the plaintiff is to be estopped from requesting to have a case stated for the decision of

the High Court. Let me say that, I think the use of the word 'estopped' is certainly unfortunate, but, given the circumstances which I shall elaborate shortly, I do not construe the words underscored above to mean a denial of the plaintiff's statutory right to request for a case to be stated to the High Court, but, are directed quite evidently to the bona fide issue of that request — one which he is perfectly entitled to do (see *General Rubber Co Ltd v Hessa Rubber Maatschappij* (1927) 28 Lloyd's Law Rep 362 at p 363). In the instant case, there is no dispute that full arguments were made concerning the validity or legal status and effect of certificate No 17, including the corollary functus officio issue by counsels for the respective parties before the second defendant in the interim award application. And, although, plaintiff's counsel submitted thereat that the second defendant should consider stating the issue of the legal status of certificate No 17 for the decision of the High Court, there was no specific or formal request or application to that effect made to the second defendant at the time. Besides, the submission on that matter came at the end of the hearing which seems to suggest that it might have arisen as an afterthought. This is all the more conceivable in view of a total and conspicuous absence of any mention of the matter in the written submission dated 12 January 1998 of the plaintiff's counsel before the second defendant. In the circumstances and in that context, it would not be unfair to say that the request of the plaintiff to the second defendant to have the legal status of certificate No 17 and its corollary functus officio issue relating to the powers of the architect to issue the said certificate, stated for the decision of the High Court, is not made bona fide. Furthermore, having considered the pleadings, affidavits and the relevant exhibits and having heard the submissions of counsels for the parties concerned, I am of the view that the legal status of certificate No 17 is not a point of law which is open to such serious argument as to justify stating it for the decision of the High Court. There is no dispute that the arbitrator (second defendant) has the power under the standard form PAM Contract to open up, review and revise the said certificate. There is also no dispute that, given his qualifications and experience, he is perfectly able to adjudicate on the matter. In any event, there do not seem to be a complete agreement by the parties as to the factual basis giving rise to the point of law raised.

In the circumstances and for the reasons given, I would decline to exercise my discretion in ordering the second defendant to state the issues or questions raised for the decision of the High Court. That being the position, there would be no reason for me to grant the interim injunction to restrain the second defendant from proceeding with the adjudication of the main arbitration proceedings. This application is, therefore, dismissed with costs.

Application dismissed.

Reported by Andrew Christopher Simon